Supreme Court, U.S.
FILED

No. __-____ 00353 SEP 6 2000

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OMNIPOINT COMMUNICATIONS ENTERPRISES, L.P.,

Petitioner,

—v.—

NEWTOWN TOWNSHIP AND
THE ZONING HEARING BOARD OF NEWTOWN TOWNSHIP,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

RUDOLPH GARCIA
Counsel of Record
STEPHEN M. DONWEBER
SAUL, EWING, REMICK & SAUL LLP
Centre Square West
1500 Market Street, 38th Floor
Philadelphia, Pennsylvania 19102
(215) 972-1961

Counsel for Petitioner
Omnipoint Communications
Enterprises, L.P.

93pf

QUESTIONS PRESENTED

This case involves an interpretation of the section within the federal Telecommunications Act of 1996 that makes it unlawful for municipal authorities to prohibit the provision of personal wireless services. 47 U.S.C. § 332(c)(7)(B)(i)(II). The court of appeals held that when a zoning ordinance prevents a wireless telecommunications carrier from providing service within a municipality, the Act is not violated unless all other carriers also are without service at the same location. The questions presented are:

1. Whether the Telecommunications Act permits local authorities to limit personal wireless services to one provider per municipality, thereby precluding service to all other providers' customers residing there, visiting or traveling through, notwithstanding the Act's intent to foster competition and facilitate widespread deployment of innovative wireless services.

2. Whether a claim under the Civil Rights Act can be based upon a violation of the Telecommunications Act.

PARTIES TO THE PROCEEDING

The caption of this case contains the names of all parties to the proceeding in the court whose judgment is sought to be reviewed.

A corporate disclosure statement is not required by Rule 29.6 because the petitioner is a partnership, not a corporation. However, it should be noted that VoiceStream Wireless Corporation ("VoiceStream") indirectly owns a 49.9% interest in the petitioner.[1] In addition, VoiceStream has entered into a merger agreement with Deutsche Telekom AG ("Deutsche") and VoiceStream and Deutsche have entered into merger agreements with Powertel, Inc.

---

[1] The remaining 50.1 percent is owned by Cook Inlet Region Inc., a corporation owned by 7,000 Alaska shareholders of Eskimo, Indian and Aleut descent.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF CITED AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTES AND ORDINANCE INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 7

A. The Court of Appeals Has Entered a Decision in Conflict with the Decisions of Several Other Courts of Appeals on the Same Important Matter. 7

B. The Court of Appeals Has Decided an Important Question of Federal Law that Has Not Been, but Should Be, Settled by this Court 12

1. The Decision Will Cripple the Personal Wireless Services Industry, to the Detriment of Millions of Consumers and Businesses. 12

2. The Decision Is Anti-Competitive, Contrary to the Essential Purpose of the Telecommunications Act. 14

3. The Decision Disturbs the Delicate Balance Struck by Congress Between Federal and Local Interests. 16

4. The Decision Frustrates Recent Public Safety Legislation Designed to Save Thousands of Lives and Billions of Dollars. 18

CONCLUSION 19

TABLE OF CITED AUTHORITIES

CASES

360 degrees Communications Co. of Charlottesville v. Board of Supervisors of Albemarle County, 211 F.3d 79 (4th Cir. 2000) 9, 10, 14, 17

APT Minneapolis, Inc. v. City of Maplewood, No. 97-2082, 1998 WL 634224 (D. Minn. Aug. 12, 1998) 11

APT Minneapolis, Inc. v. Eau Claire County, 80 F. Supp. 2d 1014 (W.D. Wisc. 1999) 10

APT Pittsburgh Ltd. P'ship v. Penn Township, 196 F.3d 469 (3d Cir. 1999) 6, 9

AT & T Wireless PCS, Inc. v. City Council of Virginia Beach, 155 F.3d 423 (4th Cir. 1998) 8

AT&T Wireless PCS, Inc. v. City of Atlanta, 210 F.3d 1322 (11th Cir. 2000), vacated by, 2000 WL 1210663 (11th Cir. Aug. 25, 2000) 11

Cellular Tel. Co. v. Zoning Bd. of Adj. of Ho-Ho-Kus, 197 F.3d 64 (3d Cir. 1999) 9

Goldwasser v. Ameritech Corp., No. 98-1439, 2000 WL 1022365 (7th Cir. July 25, 2000) 14

Industrial Communications & Elec., Inc. v. Town of Falmouth, No. 98-397, 2000 WL 761002 (D. Me. May 9, 2000) 10

Omnipoint Communications Enter., L.P. v. Newtown Township, 219 F.3d 240 (3d Cir. 2000) 1, 8, 11

Omnipoint Communications Enter., L.P. v. Newtown Township, No. 98-CV-5171, 1999 WL 269936 (E.D. Pa. Apr. 29, 1999) 1, 6

Omnipoint Communications Enter., L.P. v. Newtown Township, No. 98-CV-5171, 1999 WL 387205 (E.D. Pa. Jun. 2, 1999) 1

Omnipoint Communications MB Operations, LLC v. Town of Lincoln, No. Civ. A. 99-11012, 2000 WL 1089511 (D. Mass. Aug. 2, 2000) 10

Smart SMR of New York, Inc. v. Zoning Comm'n of Stratford, 995 F. Supp. 52 (D. Conn. 1998) 11

SNET Cellular, Inc. v. Angell, 99 F. Supp. 2d 190 (D.R.I. 2000) 10

Sprint Spectrum L.P. v. Jefferson County, 968 F. Supp. 1457 (N.D. Ala. 1997) 11

Sprint Spectrum L.P. v. Mills, 65 F. Supp. 2d 148 (S.D.N.Y. 1999) 10

Sprint Spectrum L.P. v. Willoth, 176 F.3d 630 (2d Cir. 1999) 9

Sprint Spectrum, L.P. v. Board of County Commn'rs of Jefferson County, 59 F. Supp. 2d 1101 (D. Colo. 1999) 11

Town of Amherst, N.H. v. Omnipoint Communications Enter., Inc., 173 F.3d 9 (1st Cir. 1999).....8

Western PCS II Corp. v. Extraterritorial Zoning Auth. of Santa Fe, 957 F. Supp. 1230 (D.N.M. 1997).....11

STATUTES AND RULES

28 U.S.C. § 1254.....1

28 U.S.C. § 1331.....5

28 U.S.C. § 1332.....5

28 U.S.C. § 1337.....5

28 U.S.C. § 1343.....5

28 U.S.C. § 1367(a).....5

42 U.S.C. § 1983.....2, 5

47 U.S.C. § 332.....5

47 U.S.C. § 332(c).....17

47 U.S.C. § 332(c)(7)(A).....17

47 U.S.C. § 332(c)(7)(B).....17

47 U.S.C. § 332(c)(7)(B)(i).....17

47 U.S.C. § 332(c)(7)(B)(i)(II).....i, 2, 7

Pa. Stat. Ann. tit. 53, § 10101 *et seq.* 5

Pub. L. No. 106-81, § 2(b) (1999) 18, 19

Sup. Ct. R. 29.6 ii

MISCELLANEOUS

142 Cong. Rec. H1145-06 (daily ed. Feb. 1, 1996) 15

Fed. Communications Comm'n, FCC 00-289, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Services (2000) 12

Jeff Gelles, Concern Over Cell-Phone Reliability Generates Suits, Calls for Legislation, Phila. Inq., Aug. 10, 2000 .....13, 16

Newtown Township, Pa., Zoning Code § 172 (Jan. 6, 1997).....2

Pradnya Joshi, Cell Phones Reach Mainstream, Detroit News, May 22, 2000 12

Simon Barker-Benfield, Competition Helps Make Cell Phones an Affordable Purchase for Most Consumers, Fla. Times-Union, Oct. 31, 1999.....16

Statement by President William J. Clinton upon Signing S. 652, 32 Weekly Comp. Pres. Doc. 218 (Feb. 12, 1996) 16

PETITION FOR WRIT OF CERTIORARI

Omnipoint Communications Enterprises, L.P. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a) is reported at 219 F.3d 240. The opinions of the district court have not yet been published in the official reporters, but the initial opinion (App. 14a) is reported at 1999 WL 269936 and the opinion denying reconsideration (App. 39a) is reported at 1999 WL 387205.

JURISDICTION

The court of appeals entered its judgment on July 13, 2000 (App. 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND ORDINANCE INVOLVED

The Telecommunications Act of 1996 provides in pertinent part that "The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof -- ... Shall not prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(B)(i)(II). The entire section is included in the appendix to this petition (App. 46a), together with the pertinent provisions of the Civil Rights Act (App. 57a), 42

U.S.C. § 1983, and the applicable zoning ordinance (App. 58a), Newtown Township, Pa., Zoning Code § 172 (Jan. 6, 1997).

STATEMENT OF THE CASE

This is a case of first impression for this Court, regarding conflicting interpretations of the federal Telecommunications Act of 1996. 47 U.S.C. § 332(c)(7)(B)(i)(II). The primary goals of the Act are to increase the availability and improve the quality of wireless telephone services throughout the country by facilitating the development of the necessary infrastructure and fostering competition among the providers. In order to avoid interference with those goals, the Act does not allow municipalities to take any action that has "the effect of prohibiting the provision of personal wireless services." Id.

Nevertheless, the court of appeals has ruled that if there is already one company providing coverage, a municipality *may* prohibit service by all other competing providers. That decision is contrary to the plain language and intent of the Act and numerous decisions by other courts of appeals and district courts throughout the county. If this Court does not overturn the decision, it will severely restrict the ability of wireless service providers to complete their networks and compete as contemplated by the Act.

The underlying dispute began when Newtown Township ("Township") and the Zoning Hearing Board of Newtown Township ("Zoning Board") used a local zoning ordinance to prevent Omnipoint Communications Enterprises, L.P. ("Omnipoint") from installing telecommunications antennas on the rooftop of an apartment building in Newtown Square, Pennsylvania.

Omnipoint provides personal communications services over a network of wireless telecommunications facilities, pursuant to a license from the Federal Communications Commission. Like all such providers, Omnipoint is in the process of building out its network to make wireless services more widely available, as mandated by the terms of its license. To do so, it must install facilities in many different municipalities throughout the regions it is licensed to serve.

Portable telephones operate by transmitting a very low power radio signal between the telephone and antennas mounted on towers, poles, buildings or other structures. The antennas feed the signal to electronic radio devices housed in equipment cabinets located near the antennas, where the signal is connected through a switching station to ordinary telephone lines and then routed anywhere in the world.

An array of antennas and their equipment cabinet are commonly known as a base station or cell site. The area served by the cell site is referred to as a cell. In order to provide continuous service to a telephone user, there must be a series of overlapping cells in a grid pattern approximating a honeycomb.

Omnipoint's engineers use complex computer programs to complete a propagation study, which shows where a cell site needs to be located, based on the boundaries of the cell, the topography of the land, and other factors. Once a potential site is identified, Omnipoint's engineers also perform a "drive test" with radio equipment, to verify that the site actually will provide sufficient coverage throughout the cell.

In order for the entire system to be operational, there must be enough cells with properly placed cell sites installed and functioning so that complete coverage can be realized. Only when the entire system is operational can a user have an uninterrupted conversation when traveling from cell to cell throughout a given territory.

In order to provide service in Newtown Square, Pennsylvania and surrounding areas, Omnipoint needed to establish a cell site there. To that end, it entered into a lease with the owner of an apartment building known as Newtown Towers. The antennas were to be concealed inside an inconspicuous fiberglass canister that was only 5½ feet tall and 18 inches wide. The necessary elevation would be achieved by installing the canister on the roof of a six-story building situated on a steep hill.

Omnipoint applied for a building permit to install its antennas on the apartment building's rooftop. However, the Township denied the application. Omnipoint appealed that decision by filing an application for a hearing with the Zoning Board.

At the hearing, Omnipoint presented uncontradicted testimony establishing that:

- A cell site was needed in Newtown Township to fill a gap in Omnipoint's coverage there, including portions of major thoroughfares known as West Chester Pike and Route 252;

- The Newtown Towers apartment building was the only existing structure in Newtown Township on which antennas could be installed that would be capable of filling the gap in

coverage, due to its height and specific location;

- The failure to allow the antennas to be placed on the rooftop would have the effect of prohibiting Omnipoint from providing personal wireless services in the relevant area; and

- The antennas would not have any detrimental effect on the health, safety, and welfare of the surrounding neighborhood.

Omnipoint also pointed out that the applicable zoning ordinance could not be relied upon to support a denial of Omnipoint's application because it violated the Telecommunications Act by not allowing such facilities *anywhere*.[2] Under those circumstances, a variance should have been granted to allow the installation. However, the Zoning Board denied Omnipoint's application.

Omnipoint then filed this action against the Township and the Zoning Board in the United States District Court for the Eastern District of Pennsylvania, alleging that they violated the Telecommunications Act of 1996, 47 U.S.C. § 332, the Civil Rights Act, 42 U.S.C. § 1983, and Pennsylvania's Municipalities Planning Code, Pa. Stat. Ann. tit. 53, § 10101 *et seq.*[3]

---

[2] See Omnipoint Communications Enter., L.P. v. Newtown Township, No. 98-CV-5171, 1999 WL 269936, at *4 (E.D. Pa. Apr. 29, 1999) ("Plaintiff is therefore precluded from placing the antennas that it needs to provide coverage anywhere within the Township.").

[3] Federal jurisdiction was provided by 28 U.S.C. §§ 1331 and 1337 with respect to the Telecommunications Act claim, 28 U.S.C. §§ 1331 and 1343 with respect to the Civil Rights Act claim, 28 U.S.C. § 1367(a) with respect to the state law claims and 28 U.S.C. § 1332 with respect to all of the claims.

Upon completion of discovery, both sides filed motions for summary judgment.

The district court granted Omnipoint's motion on the Telecommunications Act claim, ruling that the ordinance violated the Act because it "has the effect of prohibiting the placement of the antennas necessary for plaintiff to provide continuous service to its customers." Omnipoint Communications Enter., L.P. v. Newtown Township, No. 98-CV-5171, 1999 WL 269936, at *4 (E.D. Pa. Apr. 29, 1999).

However, the district court also held, contrary to the weight of authority, that a claim under the Civil Rights Act cannot be based upon a violation of the Telecommunications Act. The court reasoned that the Telecommunications Act provides a "comprehensive mechanism for enforcement" that did not need to be supplemented by § 1983, and that awarding damages would "unfairly place[] a burden on the taxpayers." Id. at *10.

A timely appeal was filed by the Township, and Omnipoint filed a timely cross-appeal.

The court of appeals reversed the Telecommunications Act decision based on a new requirement it had recently imposed in APT Pittsburgh Ltd. P'ship v. Penn Township, 196 F.3d 469 (3d Cir. 1999). According to APT, in order to find that a zoning decision has the "effect of prohibiting" service, a court must first determine that there are "significant gaps in the availability of wireless service." 196 F.3d at 480. For a gap to be deemed significant, the court ruled, a service provider must prove that "the area the new facility will serve is not already served by another provider." Id. at 480. Because the district court

did not apply that new standard, its decision in favor of Omnipoint on the Telecommunications Act claim was reversed. As a result, the court of appeals did not reach the merits of the Civil Rights Act decision or the state law claim.

REASONS FOR GRANTING THE PETITION

The standard applied by the court of appeals in this case is in direct conflict with the standards applied by several other courts of appeals (which also conflict with each other). As such, a decision by this Court is necessary to provide much needed uniformity within the federal courts, especially given the importance of the issue and the frequency with which it is litigated.

Moreover, the court of appeals' decision contravenes important national policies expressed by Congress and, if not corrected, will cripple the wireless communications industry, jeopardize public safety and deprive consumers of the ability to communicate without interruption while traveling through different municipalities on state and federal highways. A decision of this magnitude is worthy of the Supreme Court's review.

A. The Court of Appeals Has Entered a Decision in Conflict with the Decisions of Several Other Courts of Appeals on the Same Important Matter.

The court of appeals' decision here conflicts with numerous cases throughout the country in its ill-advised interpretation of the provision within the Telecommunications Act that makes it unlawful for municipal authorities to prohibit personal wireless services. 47 U.S.C. § 332(c)(7)(B)(i)(II). Most importantly, the court of appeals

held that in order to prove a prohibition of wireless services under the Act, a plaintiff must "include evidence that the area the new facility will serve is not already served by another provider." 219 F.3d at 244.

As defined by the court of appeals, therefore, a finding of prohibition under the Act requires proof that *all* carriers are without service in a given area, not just the carrier asserting the claim. (For the sake of convenience, Omnipoint will refer to this new standard as the "all carriers" requirement.) That standard was used here to reverse the district court's finding of prohibition even though the applicable zoning ordinance bars telecommunications facilities from being erected *anywhere* within the township's borders.

None of the other courts of appeals that have considered prohibition claims under the Telecommunications Act impose the "all carriers" requirement. Each circuit seems to have its own approach, all of which are inconsistent with each other.

The fourth circuit addressed the issue first in AT & T Wireless PCS, Inc. v. City Council of Virginia Beach, 155 F.3d 423 (4th Cir. 1998). It held there that an individual zoning decision cannot form the basis for a prohibition claim. In its view, a general ban or blanket prohibition is required to establish a violation of the Act. 155 F.3d at 428.

The first circuit disagreed in Town of Amherst, N.H. v. Omnipoint Communications Enter., Inc., 173 F.3d 9 (1st Cir. 1999). It held there that a violation can be based on an individual zoning decision, in the absence of a formal ban, by a "showing of such fixed hostility by the Board that one

can conclude that further applications would be useless." 173 F.3d at 14.

The second circuit rejected both of those approaches in Sprint Spectrum L.P. v. Willoth, 176 F.3d 630, 641 (2d Cir. 1999) (reasoning that the entire general ban standard "does not fit well or easily within the statutory scheme"). It held instead that "local governments must allow service providers to fill gaps in the ability of wireless telephones to have access to land-lines," but may reject an application "if the service gap can be closed by less intrusive means." 176 F.3d at 643.

The third circuit addressed the issue next in APT Pittsburgh Ltd. P'ship v. Penn Township, 196 F.3d 469 (3d Cir. 1999). It purported to agree with Willoth generally, but actually gutted the second circuit's standard by adding the "all carriers" requirement, holding that in order to prove a prohibition of wireless services under the Act, a plaintiff must "include evidence that the area the new facility will serve is not already served by another provider." 196 F.2d at 480. That view that one carrier per municipality is enough conflicts with all of the other approaches.[4]

Most recently, in 360 degrees Communications Co. of Charlottesville v. Board of Supervisors of Albemarle County, 211 F.3d 79, 87 (4th Cir. 2000), the fourth circuit conceded that the first circuit's hostility standard might

---

[4] The APT decision was followed in this case even though it also conflicts with intervening precedent within the same court of appeals. See Cellular Tel. Co. v. Zoning Bd. of Adj. of Ho-Ho-Kus, 197 F.3d 64 (3d Cir. 1999) (correctly focusing only on users of the particular provider's services and not imposing the "all carriers" requirement).

suffice in some cases, but flatly rejected the views of the second and third circuits.[5]

The district courts also have applied a myriad of conflicting standards, all of which are inconsistent with the third circuit's decision in this case. See, e.g., Omnipoint Communications MB Operations, LLC v. Town of Lincoln, No. Civ. A. 99-11012, 2000 WL 1089511 (D. Mass. Aug. 2, 2000) (holding that in order to prove prohibition, an applicant need not show a general ban or that wireless services are totally unavailable); SNET Cellular, Inc. v. Angell, 99 F. Supp. 2d 190 (D.R.I. 2000) (holding that in order to show prohibition, an applicant must show "from language or circumstances" that the current application has been rejected and that further applications would be futile); Industrial Communications & Elec., Inc. v. Town of Falmouth, No. 98-397, 2000 WL 761002 (D. Me. May 9, 2000) (stating that a general ban on telecommunications services is not necessary to show prohibition, but the applicant must show that further reasonable efforts would be fruitless); APT Minneapolis, Inc. v. Eau Claire County, 80 F. Supp. 2d 1014 (W.D. Wisc. 1999) (holding that a single decision may result in a "de facto" ban on personal wireless services and thus violate the statute); Sprint Spectrum L.P. v. Mills, 65 F. Supp. 2d 148 (S.D.N.Y. 1999) (finding that a single denial of an application constitutes impermissible prohibition); Sprint Spectrum, L.P. v. Board of County

---

[5] The fourth circuit characterized the decisions by the second and third circuits as applying a "least intrusive means to close a significant gap in service" test, which it rejected because in its view: "This interpretive rule effectively creates a presumption, shifting the burden of production to the local government to explain its reason for denying such an application." 211 F.3d at 87. According to the fourth circuit, that "reads too much into the Act, unduly limiting what is essentially a fact-bound inquiry." Id.

Commn'rs of Jefferson County, 59 F. Supp. 2d 1101 (D. Colo. 1999) (stating that a violation of the statute occurs where local policies or attitudes have the effect of prohibiting personal wireless services; and evidence regarding all carriers is not required); APT Minneapolis, Inc. v. City of Maplewood, No. 97-2082, 1998 WL 634224 (D. Minn. Aug. 12, 1998) (holding that a city's actions have the effect of prohibiting wireless services when it denies a carrier's applications at the only two feasible sites); Smart SMR of New York, Inc. v. Zoning Comm'n of Stratford, 995 F. Supp. 52 (D. Conn. 1998) (stating that evidence from all carriers is not required to find prohibition); Sprint Spectrum L.P. v. Jefferson County, 968 F. Supp. 1457 (N.D. Ala. 1997) (stating that a refusal to permit deployment of digital technology constitutes unlawful prohibition); Western PCS II Corp. v. Extraterritorial Zoning Auth. of Santa Fe, 957 F. Supp. 1230 (D.N.M. 1997) (stating that the denial of a single application amounts to prohibition in service and denies the applicant an opportunity compete in the area at issue).

In short, the federal courts are in need of definitive guidance on the proper way to interpret the "prohibition" provision of the Act. Given the volume of cases brought throughout the country under this key provision, the Supreme Court should clarify the applicable standard.[6]

---

[6] Although a split in authority also exists regarding the Civil Rights Act claim, it has not yet "percolated" to the courts of appeals. See Omnipoint Communications Enter., L.P. v. Newtown Township, 219 F.3d 240, 245 (3d Cir. 2000) (observing that "whether a violation of the Civil Rights Act can be based on a violation of the Telecommunications Act is an intriguing issue of first impression," but declining to decide the issue); see also AT&T Wireless PCS, Inc. v. City of Atlanta, 210 F.3d 1322 (11th Cir. 2000), vacated by, 2000 WL 1210663 (11th Cir. Aug. 25, 2000) (agreeing with Omnipoint's position, but later vacating the decision on jurisdictional grounds). Accordingly, Omnipoint does not

B. The Court of Appeals Has Decided an Important Question of Federal Law that Has Not Been, but Should Be, Settled by this Court.

In 1999 alone, the number of Americans using personal wireless services increased from 69.2 million to 86.0 million, or approximately *32 percent* of our country's entire population.[7] The "all carriers" requirement that was applied in this case will significantly impair the usefulness of wireless technologies for the vast majority of those consumers and severely damage the business of all wireless service providers. It also contravenes important national policies established by the Telecommunications Act of 1996 and the Wireless Communications and Public Safety Act of 1999.

1. The Decision Will Cripple the Personal Wireless Services Industry, to the Detriment of Millions of Consumers and Businesses.

Each carrier providing "personal wireless services" under the Act is licensed by the FCC to provide services in a unique frequency range. Accordingly, each carrier's network is unique, and in most instances *one carrier's phone will not*

---

assert that certiorari should be granted based on the conflict in authorities regarding the Civil Rights Act issue. However, the question is squarely presented in this case and should be addressed if certiorari is granted for any of the other reasons asserted.

[7] See Fed. Communications Comm'n, FCC 00-289, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Services (2000), at 5-6. See also Pradnya Joshi, Cell Phones Reach Mainstream, Detroit News, May 22, 2000 (describing pervasive use of cell phones, and noting that the "wireless market is starting to look like America").

work with another carrier's network.[8] Thus, when only one carrier has service in an area, users of most other carriers' phones will have no service there.

If the court of appeals' decision stands, the first provider to establish coverage in an area will deprive all other carriers of the right to challenge decisions prohibiting them from providing service to that same area. Local officials will take full advantage of that limitation because their constituents almost always insist that cell sites be placed in someone else's neighborhood.[9]

If only one carrier is allowed in each municipality, the country will be divided up like a multicolored mosaic with a random pattern, where some users will have service only on the blue tiles, some only on the red, some only on the green, some only on the yellow, and so on. An uninterrupted conversation would be nearly impossible as a user travels throughout a given region and moves into and out of the areas serviced by different carriers.

In order to solve that problem, a user would have to purchase service from several competing carriers at the same time and continuously change phones while traveling through different municipalities, because all the carriers would have gaps in different places. No one could have an uninterrupted conversation with a single phone while traveling down a state or federal highway.

---

[8] Only if they both happen to use the same 1 of 4 incompatible technologies could a connection be established, with roaming charges, at a much higher cost.

[9] See Jeff Gelles, Concern Over Cell-Phone Reliability Generates Suits, Calls for Legislation, Phila. Inq., Aug. 10, 2000, at F1 (describing difficulties associated with building out network footprint).

The inevitable effects of such a scenario are obvious. The usefulness of wireless telephones will be drastically impaired, consumers will lose the benefit of advanced wireless technologies[10] and the business of service providers will be severely damaged. It is difficult to imagine a greater threat to the telecommunications industry.

2. The Decision Is Anti-Competitive, Contrary to the Essential Purpose of the Telecommunications Act.

The court of appeals' decision here gives the first carrier to arrive in a locality an effective monopoly on service there, because if one carrier covers an area, all others can be prohibited from covering the same area. That is *anti-competitive*, in direct contradiction to the Act. See Goldwasser v. Ameritech Corp., No. 98-1439, 2000 WL 1022365, at *1 (7th Cir. July 25, 2000) (stating that the Telecommunications Act embodies a "competition-friendly regime[]" that "represents a comprehensive effort by Congress to bring the benefits of deregulation and competition to all aspects of the telecommunications market in the United States, including especially local markets"); 360 degrees Comm. Co., 211 F.3d at 85-86 (stating that "Congress enacted the Telecommunications Act 'to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid

---

[10] In many cases, it will be impossible to prove that no other carrier has service, because the now outdated analog service has been offered for more than a decade, since long before the enactment of the Telecommunication Act of 1996. Thus, the "all carriers" requirement also will stunt the growth of advanced digital systems by favoring the oldest and least beneficial technology, merely because it was there first.

deployment of new telecommunications technologies'" (quoting Pub. L. No. 104-104, 110 Stat. 56, 56 (1996))).

Indeed, the overarching purpose of the Telecommunications Act of 1996 is to foster competition among providers in order to benefit the general public. Illustrations from the debates on the Act highlight the centrality of competition and open markets to the Act's framers. As stated by Representative Linder (R. Ga.): "The goal of our telecommunications reform legislation is to encourage competition that will produce innovative technologies for every American household and provide benefits to the American consumer in the form of lower prices and enhanced services." 142 Cong. Rec. H1145-06, H1146 (daily ed. Feb. 1, 1996) (statement of Rep. Linder). Representative Dreier (R. Calif.) spoke with equal enthusiasm about the Act:

> First and foremost, the success of this conference demonstrates that in a bipartisan way there is an understanding that competition works. It clearly creates a great opportunity to create jobs, creates an opportunity to benefit the consumer, which is what we want to do. We want to provide the widest range of choices, and that is exactly what is going to happen here.

Id. at H1147 (statement of Rep. Dreier).

President Clinton emphatically echoed the remarks made in the House of Representatives when he signed the bill into law: "This landmark legislation . . . reform[s] our telecommunications laws in a manner that leads to competition and private investment, promotes universal service and open access to information networks, and

provides for flexible government regulation." Statement by President William J. Clinton upon Signing S. 652, 32 Weekly Comp. Pres. Doc. 218 (Feb. 12, 1996). The President went on to state that the Act "emphasi[zes]" and "promotes competition as the key to opening new markets and new opportunities." Id.

Far from "encourag[ing] competition," or providing the "widest range of choices," or promoting "universal service," the decision here rewards the first carrier to arrive in a given area with exclusive service, at the expense of all other carriers and their customers. That is not what the Act intends. Consumers should not have to choose a carrier based on which one's gaps in coverage are in the least inconvenient places.[11] Each carrier needs to build a complete network of its own for the goals of the Telecommunications Act to be realized. Competition can then be properly focused on price, features and quality of service.[12]

3. The Decision Disturbs the Delicate Balance Struck by Congress Between Federal and Local Interests.

The Telecommunications Act was designed to achieve the national goal of rapidly deploying wireless technologies with a minimum of disruption to land-use

---

[11] See Jeff Gelles, Concern Over Cell-Phone Reliability Generates Suits, Calls for Legislation, Phila. Inq., Aug. 10, 2000, at F1 (describing consumer concern over "dead spots" in cell phone networks).

[12] See Simon Barker-Benfield, Competition Helps Make Cell Phones an Affordable Purchase for Most Consumers, Fla. Times-Union, Oct. 31, 1999, at H1 (describing benefits to consumers of competition among wireless service carriers; "prices are still going down and will decline further as carriers compete for customers").

policies and procedures of local governments. As explained in 360 degrees:

> While Congress sought to limit the ability of state and local governments to frustrate the Act's national purpose of facilitating the growth of wireless telecommunications, Congress also intended to preserve state and local control over the siting of towers and other facilities that provide wireless services. It struck a balance between the national interest in facilitating the growth of telecommunications and the local interest in making zoning decisions with its enactment of § 704(a) of the Telecommunications Act, 47 U.S.C. § 332(c). Under that section, authority to regulate siting and construction of telecommunications towers is preserved in state and local governments, see 47 U.S.C. § 332(c)(7)(A), but these decisions are subject to certain limitations, see 47 U.S.C. § 332(c)(7)(B). These limitations include prohibitions against discriminating among wireless service providers and against banning personal wireless services altogether. See 47 U.S.C. § 332(c)(7)(B)(i).

211 F.3d at 86.

Congress intended to allow local governments to decide where telecommunications facilities must be placed within their borders as long as they allow them *somewhere* that will enable the service to be provided. What they cannot do is disallow them everywhere. That is why the zoning ordinance in this case is plainly violative of the Act. The

third circuit has upset the intended balance by adding the additional "all carriers" requirement that allows local governments to prohibit service by most carriers with impunity.

4. The Decision Frustrates Recent Public Safety Legislation Designed to Save Thousands of Lives and Billions of Dollars.

If allowed to stand, the court of appeals' decision also will thwart the national public policy expressed by the Wireless Communications and Public Safety Act of 1999, the stated purpose of which is "to encourage and facilitate the prompt deployment throughout the United States of a seamless, ubiquitous, and reliable end-to-end infrastructure for communications, including wireless communications, to meet the Nation's public safety and other communications needs." Pub. L. No. 106-81, § 2(b) (1999). Congress recognized in enacting that legislation that *wireless networks save lives*:

> The Congress finds that--
>
> (1) the establishment and maintenance of an end-to-end communications infrastructure . . . will reduce response times for the delivery of emergency care, assist in delivering appropriate care, and thereby prevent fatalities, substantially reduce the severity and extent of injuries, reduce time lost from work, and save thousands of lives and billions of dollars in health care costs.
>
> * * *

> (6) the construction and operation of seamless, ubiquitous, and reliable wireless telecommunications systems promote public safety and provide immediate and critical communications links among members of the public; emergency medical service providers and emergency dispatch providers; public safety, fire service and law enforcement officials; transportation officials, and hospital emergency and trauma care facilities.

Id. § 2(a).

Congress has therefore made the deployment of wireless networks a national priority. That priority is frustrated by the third circuit's "all carriers" requirement, because it allows local officials to keep most providers out of their municipalities. The resulting patchwork would deprive most users of service at most locations. That runs directly contrary to the important goals of the Wireless Communications and Public Safety Act of 1999.

CONCLUSION

The court of appeals' decision conflicts with other appellate decisions, impairs important national policies established by Congress and deals a devastating blow to the personal wireless services industry and the public. If the decision is not corrected, telecommunications carriers will be unable to complete their networks, users will be unable to communicate as they travel, consumers will lose the benefit of competition among carriers, and public safety will be compromised.

Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

RUDOLPH GARCIA, ESQUIRE
Counsel of Record
STEPHEN M. DONWEBER, ESQUIRE
Saul, Ewing, Remick & Saul LLP
Centre Square West
1500 Market Street, 38th Floor
Philadelphia, PA 19102
(215) 972-1961 & (215) 972-8568
Counsel for Petitioner, Omnipoint Communications Enterprises, L.P.

SEPTEMBER 5, 2000

APPENDIX

APPENDIX

Omnipoint Communications Enter., L.P. v. Newtown Township, 219 F.3d 240 (3d Cir. 2000) 1a

Omnipoint Communications Enter., L.P. v. Newtown Township, No. 98-CV-5171, 1999 WL 269936 (E.D. Pa. Apr. 29, 1999) 14a

Omnipoint Communications Enter., L.P. v. Newtown Township, No. 98-CV-5171, 1999 WL 387205 (E.D. Pa. Jun. 2, 1999) 39a

Pertinent Portions of the Telecommunications Act of 1996, 47 U.S.C. § 332 ..... 46a

Pertinent Portions of the Civil Rights Act, 42 U.S.C. § 1983 ..... 57a

Pertinent Portions of the Newtown Township Zoning Ordinance, Newtown Township, Pa., Zoning Code § 172 (Jan. 6, 1997) 58a

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 99-1453, 99-1455 and 99-1458

OMNIPOINT COMMUNICATIONS ENTERPRISES, L.P.
v.
NEWTOWN TOWNSHIP; ZONING HEARING BOARD OF NEWTOWN TOWNSHIP

Appellants in No. 99-1453

OMNIPOINT COMMUNICATIONS ENTERPRISES, L.P.
Appellant in No. 99-1455
v.
NEWTOWN TOWNSHIP; ZONING HEARING BOARD OF NEWTOWN TOWNSHIP

OMNIPOINT COMMUNICATIONS ENTERPRISES, L.P.
v.
NEWTOWN TOWNSHIP; ZONING HEARING BOARD OF NEWTOWN TOWNSHIP

Appellants in No. 99-1458

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 98-CV-05171)
Magistrate Judge: Honorable Charles B. Smith

Argued
March 20, 2000

Before: MANSMANN, GREENBERG and ALARCON,* Circuit Judges.

(Filed July 13, 2000)

Bruce A. Irvine, Esquire
David C. Corujo, Esquire (Argued)
Fronefield & deFuria
216 South Orange Street
P.O. Bax 647
Media, PA 19063

Paola T. Kaczynski, Esquire
(Argued)
Holstein & Associates
One Olive Street
Media, PA 19063

Counsel for Appellants/Cross Appellees.

Rudolph Garcia, Esquire (Argued)
Joseph R. Loverdi, Esquire
Stephen M. Donweber, Esquire
Saul, Ewing, Remick & Saul
3800 Centre Square West
Philadelphia, PA 19102

---

* Honorable Arthur Alarcon of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

Counsel for Appellee/Cross
Appellant.

OPINION OF THE COURT

MANSMANN, *Circuit Judge*

*1 Newtown Township appeals the District Court's order directing it to allow Omnipoint to install antennas for its Personal Communications System at a designated site within Newtown. Newtown claims that the District Court erred in concluding that its zoning ordinance has the impermissible effect of prohibiting the provision of personal wireless services, in violation of the Telecommunications Act. Further, Newtown claims that the District Court erred in finding that the Zoning Hearing Board's findings and conclusions relating to whether there was a violation of the Telecommunications Act were not supported by substantial evidence. Omnipoint defends the District Court's conclusion and cross-appeals the District Court's conclusion that the enforcement procedures of the Telecommunications Act foreclose a civil rights remedy under 42 U.S.C. § 1983.

With respect to Newtown's prohibition of the provision of wireless services, the determination must be made, first, about whether there is, in fact, a "significant gap" whereby Newtown is not adequately provided with wireless service, and second, if there is a gap, whether according to Omnipoint's plan, the least intrusive means would be used to bridge it. We conclude that the record

before the District Court was insufficient to determine whether or not there is a "significant gap" in wireless services and thus whether or not Newtown's zoning ordinances violated the Telecommunications Act by effectively prohibiting the provision of personal wireless services. We need not, and do not, reach the question of whether the least intrusive means were proposed by Omnipoint to bridge any gap, nor do we reach the section 1983 issue. We will vacate and remand to the District Court with instructions that it remand this case to the Zoning Hearing Board to reconsider the proposed facility in compliance with this opinion, as well as our opinions in *APT Pittsburgh Ltd. Part. v. Penn Tp. Butler County of Pennsylvania*, 196 F.3d 469 (3rd Cir. 1999) and *Cellular Tel. v. Zoning Bd. of Adj. of Ho-Ho-Kus*, 197 F.3d 64 (3rd Cir. 1999).

I.

Omnipoint provides personal communications services, essentially portable telephone service, over a network of wireless telecommunications facilities. To provide continuous service to its customers, there must be a series of overlapping cells in a grid pattern. Currently, Omnipoint has a gap in its coverage in Newtown Township and surrounding areas. To fill this gap, Omnipoint entered into a lease allowing it to install antennas on the Newtown Towers apartment building's rooftop. Omnipoint then applied for a building permit to install the antennas, which Newtown's Zoning Officer denied, on the ground that, under Newtown's Zoning Ordinance, the proposed antennas are not a permitted use or accessory use in the Apartment-Office District, the district in which Newtown Towers is located.

Omnipoint appealed the decision to the Zoning

Hearing Board of Newtown, based upon both the Zoning Officer's finding that the antennas were not a permitted or accessory use and an alleged violation of the Telecommunications Act, 47 U.S.C. § 332(c)(7)(B). Following public hearings through the spring of 1998, the Zoning Hearing Board denied Omnipoint's appeal.

*2 Omnipoint then filed an action in District Court against Newtown Township, alleging a violation of the Telecommunications Act, a violation of the Civil Rights Act, and a violation of state zoning law. The parties filed Cross-Motions for Summary Judgment.

The District Court granted Omnipoint's Motion for Summary Judgment and denied Newtown's Motion for Summary Judgment; the District Court, nevertheless, denied Omnipoint's claim for attorney's fees under the Civil Rights Act, and granted Newtown's Motion for Summary Judgment as to this claim only.

Our standard of review upon the grant of summary judgment is plenary. *Horowitz v. Federal Kemper Life Assur.*, 57 F.3d 300 (3rd Cir. 1995) On review, an appellate court is required to apply the same test the District Court should have used initially. Id. Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is not any genuine issue as to a material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). One of the rule's principal purposes is to dispose of factually unsupported claims or defenses. *Celotex v. Catrett*, 477 U.S. 317, 325 (1986). In considering a motion for summary judgment, we examine all the evidence in the light most favorable to the non-moving party. *Anderson v. Liberty*

Lobby, 477 U.S. 242, 257 (1986). Summary judgment must be granted if the party responding to the motion fails "to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Celotex*, 477 U.S. at 323. When the moving party does not bear the burden of proof, summary judgment is warranted by demonstration of an absence of facts to support the non-moving party's case. *Id.* at 325.

[1] The Telecommunications Act was an "overhaul of the federal regulation of communications companies." *Cellular Tel. v. Oyster Bay*, 166 F.3d 490, 492-93 (2d Cir. 1999). It was designed:

> to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced technologies and services ... by opening all telecommunications markets to competition....

Id. at 493 (quoting H.R.Conf.Rep. No. 104-458, at 206 (1996)). As the District Court stated, the Act was intended to promote competition by limiting the ability of local authorities to regulate and control the expansion of telecommunications technologies. For example, under the Act, courts review telecommunication zoning denials more closely than standard zoning decisions. *Oyster Bay*, 166 F.3d at 493.

Two provisions of the Act are at issue in this case. The first provision at issue here provides:

> The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof--

* * *

*3 (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

47 U.S.C. S 332(c)(7)(B)(i)(II) (Supp.III). With respect to this provision of the Act, Omnipoint claims that the City's decision has the effect of prohibiting personal wireless services.

Omnipoint's second claim, that regarding "substantial evidence," arises under the following provision:

Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

47 U.S.C. S 332(c)(7)(B)(iii) (Supp. III 1997).

II.

[2] On appeal, Newtown challenges the District Court's holding in Omnipoint's favor that the Newtown zoning ordinances had the effect of prohibiting the provision of personal wireless services in violation of the Telecommunications Act, because it left Omnipoint unable to fill its gap in service.[13] Omnipoint had challenged

---

[13] The evidence in the District Court showed that the zoning ordinance might permit antennae in the Light Industrial Zone, but that space in the Zone might be unobtainable for other reasons. We need not

Newtown's Zoning Hearing Board's denial of permission to construct communications antennae as violating the Telecommunications Act, because under the zoning ordinances the antennae are not a permitted use anywhere within Newtown.

While the Telecommunications Act recognizes local governments' right to exercise their land use authority over personal wireless services, 47 U.S.C. § 332(c)(7), it places both substantive and procedural limitations on this authority. Principally at issue here is the Telecommunications Act's provision that "[t]he regulation of the placement, construction or modification of wireless service facilities by any State or local government or instrumentality thereof ... shall not prohibit or have the effect of prohibiting the provision of wireless services." 47 U.S.C. § 332(c)(7)(B). The Telecommunications Act also includes the procedural safeguards that any decision adverse to a wireless provider be in writing and that the decision must be supported by "substantial evidence". 47 U.S.C .(c)(7)(B)(iii). Omnipoint alleges that the Zoning Board's decision in this case was not supported by "substantial evidence."

Omnipoint has presented evidence of a gap in coverage in its wireless services in Newtown and surrounding areas, including portions of the West Chester Pike and Route 252. Omnipoint argues that if the Zoning Board's decision leaves a "significant gap" in wireless services, section 332(c)(7)(B)(i)(II) has been violated. Newtown argues that a mere gap is not sufficient, and that rather, there must be a "significant gap" as to all wireless services and not within the service of a single wireless

---

examine this issue further, because it is immaterial to the standard by which we determine the existence of a "significant gap."

provider.

[3] The District Court, in deciding this case, did not have the benefit of our recent decisions within which this case fits squarely, *Cellular Tel. v. Zoning Bd. of Adj. of Ho-Ho-Kus*, 197 F.3d 64 (3d. Cir. 1999) and *APT Pittsburgh Ltd. Part. v. Penn Tp.*, 196 F.3d 469 (3rd Cir. 1999). These decisions support Newtown. We held in *Ho-Ho-Kus*, 197 F.3d at 70, that "local zoning policies and decisions have the effect of prohibiting wireless services if they result in 'significant gaps' in the availability of wireless services." We also held in APT Pittsburgh, nevertheless, that "it is necessary for the provider to show more than that it was denied an opportunity to fill a gap in its service system." *APT Pittsburgh*,[14] 196 F.3d 469 at 480. The question in this case is whether a decision which creates a gap in one cellular provider's service violates section 332(c)(7)(B)(i)(II) when other providers serve the area. We held in APT Pittsburgh that in such a case,

> *4 the relevant gap, if any, is a gap in the service available to remote users. Not all gaps in a particular provider's service will involve a gap in the service available to remote users. The provider's showing on this issue will thus have to include evidence that the area the new facility will serve is not already served by another provider.

---

[14] Under *APT Pittsburgh*, showing a "significant gap" in service satisfies the first prong of the test. Under the second prong, the provider "must also show that the manner in which it proposes to fill the significant gap in service is the least intrusive on the values that the denial sought to serve." 196 F.3d at 480. As we find the record insufficient to determine whether there was or was not a "significant gap" in service, we need not examine the manner in which Omnipoint proposes to fill it.

196 F.3d at 480.

[4] We held in *Ho-Ho-Kus* "that there is a 'gap' in personal wireless services when a remote user of those services is unable either to connect with the landbased national telephone network, or to maintain a connection capable of supporting a reasonably uninterrupted communication," *Ho-Ho-Kus*, 197 F.3d at 70, and reiterate here that the doctrine prohibiting gaps is designed to protect the users, not the carriers. The question then remains as to whether other providers already serve the area at issue in this case.

At the Zoning Hearing Board, Newtown put forth evidence that other cell phone providers had coverage without gaps. For example, there was evidence that Sprint had good service throughout Newtown, without gaps in coverage. Omnipoint did not contradict Newtown's assertions on this point and did not put forth any evidence either there, or in the District Court, as to whether other cell phone providers had gaps in their service in the Newtown area.

Newtown urges us to take an activist approach and to find that as to the community of cell phone providers serving Newtown, there were not any gaps. We will decline to do so.[15] Lacking the guidance of our decision in *Ho- Ho-Kus*,

---

[15] Omnipoint also beseeches that we could find in its favor without returning the case to the District Court. Omnipoint prods us to find that Newtown's ordinance effectively prohibits the proper placement of not only an additional cell site, but of all cell sites anywhere in the township. The fact remains, however, that we focus upon the end result to the consumers and their reception of uninterrupted wireless telephone

and in particular, in *APT Pittsburgh*, the Zoning Hearing Board did not make findings on the issue of gaps among other providers. Under these circumstances, the record before the District Court was not sufficiently developed. We cannot agree with the District Court's conclusion, therefore, that the Zoning Hearing Board's denial had the effect of prohibiting the provision of personal wireless services.

Because the Zoning Hearing Board did not make findings on the issue of gaps among other providers in Newtown, we cannot fault the conclusion of the District Court, made with a different basis, that the Zoning Hearing Board's findings and conclusions were not supported by the "substantial evidence" required by the Telecommunications Act. Nevertheless, we must return this matter to the District Court for the application of the appropriate standard.

III.

[5] In its cross-appeal, Omnipoint asserts that the District Court erred in holding that a claim under the Civil Rights Act, 42 U.S.C. § 1983 cannot be based on a violation of the Telecommunications Act. Omnipoint asserts that Newtown acted under color of state law when it violated Omnipoint's rights under the Telecommunications Act. This presents an interesting question, the resolution of which could benefit Omnipoint greatly, primarily because the Civil Rights Act could potentially provide Omnipoint with an additional remedy, the recovery of attorney's fees, otherwise not available under the Telecommunications Act.

*5 [6] Though whether a violation of the Civil Rights

---

service, and thus, Omnipoint's argument, failing to address the test in *APT Pittsburgh*, is unavailing.

Act can be based on a violation of the Telecommunications Act is an intriguing issue of first impression, we will not reach it now. The ripeness doctrine prevents us from "entangling [our]selves in abstract disagreements." *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967). The Civil Rights Act question is not ripe in light of our decision to remand the case to the District Court and from there, to the Zoning Hearing Board, to determine if Newtown violated the Telecommunications Act under the test outlined in *APT Pittsburgh*. Depending on the decisions there, this issue may become moot. *See In re School Asbestos Litig.*, 977 F.2d 764, 796 (3d Cir. 1992).[16]

IV.

In sum, we vacate the District Court's grant of summary judgment to Omnipoint and affirm the District Court's grant of summary judgment to Newtown. We remand to the District Court with instructions that it remand to the Zoning Hearing Board to reconsider the proposed facility in compliance with this opinion, as well as our opinions in *APT Pittsburgh* and *Ho-Ho-Kus*. As we did in *Ho- Ho-Kus*, 197 F.3d 75, we note that the Telecommunications Act requires the Board to act "within a reasonable period of time." 47 U.S.C. § 332(c)(7)(B)(ii).

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

---

[16] Under the same ripeness analysis, we agree with the District Court that Omnipoint's state law claim is premature.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 99-1453, 99-1455 and 99-1458

OMNIPOINT COMMUNICATIONS ENTERPRISES, L.P.
v.
NEWTOWN TOWNSHIP; ZONING HEARING BOARD OF NEWTOWN TOWNSHIP

Appellants in No. 99-1453

OMNIPOINT COMMUNICATIONS ENTERPRISES, L.P.
Appellant in No. 99-1455
v.
NEWTOWN TOWNSHIP; ZONING HEARING BOARD OF NEWTOWN TOWNSHIP

OMNIPOINT COMMUNICATIONS ENTERPRISES, L.P.
v.
NEWTOWN TOWNSHIP; ZONING HEARING BOARD OF NEWTOWN TOWNSHIP

Appellants in No. 99-1458

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 98-CV-05171)
Magistrate Judge: Honorable Charles B. Smith

Argued

March 20, 2000
Before: MANSMANN, GREENBERG and
ALARCON,* Circuit Judges.

(Filed July 13, 2000)

JUDGMENT

These causes come on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and were argued on March 20, 2000.

On consideration whereof, it is now here ORDERED AND ADJUDGED by this Court that the order of the District Court entered in April 29, 1999 be, and the same is hereby vacated and the case is remanded to the District Court for further proceedings in accordance with the opinion of this Court. Costs taxed against appellee Omnipoint. All of the above in accordance with the opinion of this Court.

ATTEST:

s/

Clerk

Dated: July 13, 2000

---

* Honorable Arthur Alarcon of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OMNIPOINT COMMUNICATIONS ENTERPRISES, L.P., Plaintiff	:	CIVIL ACTION
vs.	:	FILED: April 29, 1999
NEWTOWN TOWNSHIP, and ZONING HEARING BOARD OF NEWTOWN TOWNSHIP Defendants	:	NO. 98-5171

MEMORANDUM AND ORDER

CHARLES B. SMITH
UNITED STATES MAGISTRATE JUDGE

*1 Presently before the Court are Cross-Motions for Summary Judgment. For the reasons that follow, I will grant plaintiff Omnipoint's motion and deny the defendant's Motion for Summary Judgment. However, the plaintiff's claim for attorney's fees under the Civil Rights Act is denied and I will grant the defendant's Motion for Summary Judgment as to this claim only.

I. FACTUAL HISTORY

Plaintiff, Omnipoint Communications, LTD, is a business which provides to its customers personal communications services ("PCS") over a network of wireless telecommunications facilities. In order to provide continuous

service to its customers, there must be a series of overlapping cells in a grid pattern. Currently, Omnipoint has a gap in its coverage in Newtown Township and surrounding areas, including portions of West Chester Pike and Route 252. In order to fill this gap, Omnipoint entered into a lease agreement with Daniel T. Mullray, allowing them to install antennas on the rooftop of an existing apartment building known as Newtown Towers, Building C, at 3400 West Chester Pike, Newtown Square, PA. Plaintiff then applied for a building permit to install the antennas, which the Township's Zoning Officer denied by letter dated November 14, 1997. The Zoning officer indicated that under the Township's Zoning Ordinance, the proposed antennas are not a permitted use or accessory use in the A-O (Apartment Office) District, the district in which the Newtown Towers Apartments are located.

Plaintiff appealed the Zoning officer's decision by filing an application to the Zoning Hearing Board of Newtown Township on December 15, 1997. The application was an appeal of the Zoning Officer's denial of the building permit based on the finding that it was not a permitted or accessory use. In addition, plaintiff also alleged a violation of the Federal Telecommunications Act of 1996, 47 U.S.C. § 332(c)(7)(B).

Public hearings were held on April 16, 1998, May 6, 1998, May 29, 1998, June 30, 1998, and July 16, 1998. Present at the hearings were George Asimos, Esq. on behalf of plaintiff, Bruce Irvin, Esq. on behalf of Newtown Township, John Prodoehl, Jr., Esq. on behalf of a local resident, Marie Tittermary, and another resident, Regina Siberski, appeared pro se. After hearing testimony from numerous witnesses and experts, the Board denied the Plaintiff's appeal in a writing issued August 31, 1998. The

Zoning Board issued findings of Fact and Conclusions of Law on September 2, 1998.

Plaintiff then filed this action in District Court against defendant, Newtown Township, alleging a violation of the Telecommunications Act, violation of The Civil Rights Act, and a violation of state zoning law. The parties have filed Cross-Motions for Summary Judgment and oral argument was entertained on the motions on April 14, 1999.

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 56(c) states that summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Williams v. Borough of West Chester, 891 F.2d 458, 463-464 (3d Cir. 1989). A factual dispute is "material" only if it might affect the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). For an issue to be "genuine", a reasonable fact finder must be able to return a verdict (or render a decision) in favor of the non-moving party. Id. On summary judgment, it is not the court's role to weigh the disputed evidence and decide which is more probative. Brewer v. Quaker State Oil Refining Co., 72 F.3d 326, 331 (3d Cir. 1995). Rather, the court must consider the evidence, and all reasonable inferences which may be drawn from it, in the light most favorable to the non-moving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962); Tigg Corp. v. Dow Corning Corp., 822 F.2d 358, 361 (3d Cir. 1987); Baker v. Lukens Steel Co., 793 F.2d 509, 511 (3d Cir. 1986). If a conflict arises between the evidence presented by both

sides, the court must accept as true the allegations of the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. at 255.

*2 Notably, however, Rule 56(e) sets forth the burden of the nonmoving party as follows:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule must set forth the specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Fed.R.Civ.P. 56(e). See Roa v. City of Bethlehem, 782 F. Supp. 1008, 1014 (E.D.Pa.1991) (a party resisting a motion for summary judgment must specifically identify evidence of record which supports her claim and upon which a verdict in her favor may be based.) With respect to an issue on which the non-moving party has the burden of proof, the burden on the moving party may be discharged by "showing"--that is, pointing out to the district court-- that there is an absence of evidence to support the nonmoving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

This case is appropriate for summary judgment because there are no issues of material fact remaining. The issues that remain can appropriately be resolved through these motions.

III. DISCUSSION

FEDERAL TELECOMMUNICATIONS ACT

The Telecommunications Act ("TCA" or "The Act") clearly acknowledges the right of local governments to exercise their land use authority over personal wireless services. See 47 U.S.C. § 332(c)(7). However, it places both substantive and procedural limitations on local land use authority. The Act provides that "[t]he regulation of the placement, construction or modification of wireless service facilities by any State or local government or instrumentality thereof (I) shall not unreasonably discriminate among providers of functionally equivalent services; and (II) shall not prohibit or have the effect of prohibiting the provision of wireless services." 47 U.S.C. § 332(c)(7)(B). There are also two procedural safeguards included within the Act. First, it requires that any decision adverse to a wireless provider be in writing and second, the decision must be supported by "substantial evidence". 47 U.S.C. (c)(7)(B)(iii). Plaintiff alleges that the Zoning Board's decision in this case violates both substantive limitations and was not supported by "substantial evidence".

Substantive limitations:

Plaintiff alleges that the Zoning Board has unreasonably discriminated among providers of wireless service, in violation of 47 U.S.C. § 332(c)(7)(B)(i)(I). In order to prove unreasonable discrimination under the Telecommunications Act, a plaintiff must demonstrate both unequal treatment and that there was no basis for the unequal treatment. See Sprint Spectrum L.P. v. Jefferson County, 968 F. Supp. 1457, 1467-68 (N.D.Ala.1997). Plaintiff claims it has been treated unfairly because it's request for a permit to install antennas was denied, thus preventing it from providing continuous service to its customers. Plaintiff

points to the fact that several other companies have erected antennas in the Township.

*3 While it appears to be clear from the record that other companies have installed antennas in Newtown Township, this does not establish that plaintiff has been unfairly discriminated against in violation of the TCA. In fact, plaintiff has been treated exactly the same as one of its competitors. AWACS/Comcast, one of the companies that now has antennas within the Township, previously applied for a permit to install its antennas in the exact location for which plaintiff is now seeking its permit. The Zoning Board denied AWACS's request, just as it did plaintiff's in this case, and AWACS then installed its antennas in a different location. The fact that defendant has permitted antennas to be installed in other locations within the Township, even though they may not be permitted by the ordinance, does not demonstrate unfair discrimination. The intent of the Act was "to insure that a State or local government does not in making a decision regarding the placement, construction and modification of facilities of personal wireless services...unreasonably favor one competitor over another." Omnipoint v. City of Scranton and Zoning Hearing Bd. of Scranton, 1999 WL 661110 (M.D.Pa) (quoting H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. 208 (1996)). The denial of plaintiff's application is not sufficient to demonstrate unfair discrimination against plaintiff in favor of a competitor and does not demonstrate unequal treatment in violation of the TCA.

Plaintiff also alleges that the Township has violated 47 U.S.C. § 322(c)(7)(B)(i)(II), the provision of the Telecommunications Act that bars any regulatory conduct that prohibits or has the effect of prohibiting personal wireless service. Plaintiff claims that under the zoning

ordinance, the antennas are not a permitted use anywhere within the Township, with the possible exception of the area zoned Light Industrial.

The testimony revealed that the only area where the zoning ordinance might actually allow the antennas is the area zoned Light Industrial.[17] The only land zoned Light Industrial in the area that could provide coverage for plaintiff is owned by a single owner, SAP America, who indicated to plaintiff that it was not interested in negotiating a lease (Tr. at 345-46, App. 23). The Township argues that plaintiff's failure to negotiate a lease with SAP America may be due to the fact that it only offered to pay half of what it agreed to pay for the Newtown Towers lease. However, the letter admitted at the hearing, which was signed by a SAP America representative, did not state that they were unhappy with the offer, but indicated that they were not willing to negotiate (Tr. at 345-46, App. 23). There was also testimony regarding a portion of the property being used for a Township road. This road would not consume the entire piece of land, but might have contributed to the owner's reluctance to enter into any negotiations regarding a lease.

The fact that a single owner holds the only land where a given use is permitted gives that owner the ability to negotiate an unreasonable price or to simply preclude the use. The zoning in effect, creates a monopoly with the owner

---

[17] There was a stipulation entered into by Mr. Irvine, Counsel for the Township (Tr. at 37-38). Counsel now dispute whether the stipulation was merely that antennas are a permitted use in the area zoned as Light Industrial or whether the stipulation was that this is the only area where the antennas are a permitted use. Regardless of the stipulation, there was no evidence presented which indicated that the use was permitted under the ordinance anywhere else within the township.

holding the key to the company's being able to provide service to its customers. This is likely not what was envisioned when the Telecommunications Act was enacted.

*4 The Township claims that in addition to the SAP America property, the antennas are also permitted within a Special Use district (Ex. Mfindings at 4). There was no testimony indicating that the antennas were permissible within the Special Use districts and no testimony regarding what property was located within these districts. Although it is not part of the written record, during oral argument on these motions, counsel for the Township indicated that the KISS 100 Tower, where several other companies including Comcast have placed antennas, is located within the special use district. However, counsel also indicated that the KISS 100 Tower was built prior to the Township's current zoning and they have allowed KISS to negotiate leases with whomever they choose, without requiring permits.

While other companies have erected antennas within the Township, it is not because the use was permitted by the ordinance. It is because the Township has allowed them to place the antennas in areas that are already not in compliance with the current zoning. There is no evidence that any of the other companies actually applied to the Zoning Board for permits or variances. Rather, they negotiated leases with KISS 100, who was essentially grand-fathered in that area and with the utility company, which is exempt from such zoning requirements. The fact that the Township has looked the other way in the placement of these antennas does not alleviate the fact that according to its ordinance, the use is not permitted.

In addition, in this case there was testimony that an antenna on the KISS tower would lessen the gap, but would

not provide full coverage for plaintiff (Tr. at 86, 98, 100). There was additional testimony regarding the possible use of repeaters to fill the remaining gap (Tr. at 460-63). However, there is no evidence regarding where the repeaters could be placed and whether their installation would be permitted under the ordinance.

It does not appear that the Township's zoning ordinance allows for placement of antennas necessary for the provision of wireless service anywhere, except possibly for the area zoned as Light Industrial. The Light Industrial area is not an option in this case because it is possessed by a single owner who has indicated he is unwilling to negotiate a lease with plaintiff (Tr. at 345-46, App. 23). While the Township is not responsible simply because the plaintiff is unable to negotiate a lease, a company should not be forced to negotiate with a single owner of property, giving the owner the ability to preclude the company's business operation if it so chooses. By allowing the antennas to be placed only within this area, the ordinance has the effect of prohibiting the placement of the antennas necessary for plaintiff to provide continuous service to its customers. Plaintiff is therefore precluded from placing the antennas that it needs to provide coverage anywhere within the Township.

The Township's current ordinance has the effect of prohibiting the provision of personal wireless services, in violation of the Telecommunications Act. Presumably, the ordinance was adopted prior to the need to make provisions for wireless communications systems. The Township has the right to regulate the placement of the antennas, but the regulation must comply with the limits provided by the Act. 47 U.S.C. § 322(c)(7)(B). Rather than simply choosing to look the other way when the placement of the antennas suits

its needs, the Township must make the installation of personal wireless communication services equipment a permissible use under its ordinance.[18]

*5 Despite the fact that the antennas are not permitted anywhere in the Township, plaintiff applied for a permit to install the antennas in a location where they would not have a significant impact. In order to fill the gap in coverage without the use of repeaters, the antennas must be located within a limited geographical location. Plaintiff first looked to install the antennas in a location where it might be permitted under the ordinance and when that was not available chose the rooftop of an existing tall structure within this location, rather than applying to build a new tower (Tr. at 333-34). By denying the permit for plaintiff to install the antennas in the location they proposed in order to cure this violation, the Township violated the Telecommunications Act. Plaintiff must now be permitted to install its antennas in the proposed location. See Adams Outdoor Advertising, Ltd. v. Borough of Coopersburg Zoning Hearing Bd., 625 A.2d 768, 770 (Pa. Commw.1993) (stating that where a legitimate use is excluded by a zoning ordinance the appropriate remedy is to grant the requested application provided "submitted plans are not injurious to public health, safety,

---

[18] Under the current ordinance, not only is the use not permitted in a location that would enable plaintiff to install its antennas, but it is questionable whether it is permitted anywhere within the Township. Counsel for the Township stipulated at the hearing that the antennas would be permitted in the area zoned as light industrial. However, under the ordinance even this is questionable. The light industrial zone allows for "microwave towers", which are not truly the same as the towers necessary for telecommunications facilities. The height limitations for this area, contained in § 172-105, are also questionable. Plaintiff argues that although it permits towers on existing buildings to exceed the height limitation, it would not apply to a free standing tower in that area.

welfare and morals").

Procedural Limitations:

The Board's decision was in writing, as required by the Act, but plaintiff claims the Township further violated the TCA because the decision was not supported by "substantial evidence", as required by 47 U.S.C. § 332(c)(7)(B)(iii). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Cellular Tele. Co. v. Zoning Bd. of Adjustment of the Borough of Ho-Ho-Kus, 24 F. Supp.2d 359, 365-66 (D.N.J.1998). As long as there is adequate evidence to support the Board's decision, the court must affirm the decision even if it would have decided the case differently. Id. The local zoning authority bears the burden of demonstrating its denial is supported by substantial evidence and each statement must be supported by some evidentiary basis. See Omnipoint v. Penn Forest Township, 1999 WL 181954 at *4-5 (M.D.Pa).

After reviewing the record, it is the opinion of this Court that the Board's findings and conclusions of law related to interpretation of the ordinance as to whether the antennas are an "accessory use" are supported by substantial evidence. The ordinance provides that the permitted uses in the Apartment/Office zoning district are:

"(a) apartment house building,

(b) service office building, and

(c) accessory uses on the same lot with and customarily incidental to the foregoing permitted uses. The term accessory use does not include a business but may include

a recreational use when authorized as a special exception by the Zoning Hearing Board, when using as standards and guides generally the requirements of this chapter and specifically the requirements of this article."

The ordinance clearly defines an accessory use as "a use subordinate to the main building on a lot and customarily incidental thereto" (§ 172-2). The ordinance allows service shops, a business use, within the apartment housing only "when they are designed and located to serve the occupants".

*6 The Board's conclusion that the proposed antenna is not an "accessory use" which is permitted in the A/O district seems to be supported by the ordinance itself and the record. There was no evidence presented which demonstrated that the antenna would fit this definition of an accessory use to the apartment building or to a building simply because it is a tall structure. The installation of plaintiff's antennas is not incidental to the building's use as an apartment. The occupants, who are primarily senior citizens, would not be receiving any special benefit from the installation of the antennas. The Board also correctly compared this application to AWACS' prior application to position it's antennas in the same location. AWACS had also claimed the antennas were an accessory use. This Court agrees with the Zoning Board and with the Pennsylvania Commonwealth Court that the installation of the antennas is clearly not a permitted or accessory use within this zoning district. See AWACS Inc. v. Zoning Hearing Board of Newtown Township, Delaware County, 702 A.2d 604 (Pa. Commw. 1997). Accordingly, purely from a zoning perspective, the Board's findings were supported by substantial evidence.

However, this Court finds that the Board's findings

and conclusions regarding the Telecommunication Act are not supported by "substantial evidence". The Board concluded that it is impossible to draw the conclusion that the Township Ordinance prohibits or has the effect of prohibiting the provision of wireless services because they are specifically permitted in the Light Industrial districts and in the Special Use district, where the KISS Tower is located. (Ex. M findings at 13).

First, this Court concludes that there was no evidence in the record to indicate that the use is specifically permitted in the Special Use districts or that the KISS tower is located in such a district. The evidence was simply that other companies had placed antennas on the tower (Tr. at 60-61). There is evidence that the ordinance and the denial of the building permit in this case result in a ban of continuous service for plaintiff. Plaintiff's expert testified that an antenna placed on the KISS Tower would lessen the gap in coverage, but would not close it even with the use of repeaters on telephone poles (Tr. at 86, 98, 100). The Township's expert, Nelson, testified that with the use of repeaters, alterations to the height and tilt of the antennas, and increases in the power, the gap could be closed (Tr. at 460-63). However, he admittedly had not performed a propagation study or conducted a drive test of the site (Tr. at 494-95). In response, plaintiff's senior radio frequency engineer, Zarei, testified that raising the height of the antennas and changing the tilt is not a feasible alternative because it would cause interference in the rest of the network (Tr. at 530-34). There was also no testimony that repeaters would actually be permitted to be placed on telephone poles,

as suggested by the Township.[19] The utility companies are exempt from zoning requirements, but plaintiff is not. See AWACS Inc. v. Zoning Hearing Bd. of Newtown Township, supra. Most significantly, there was no evidence presented that under the ordinance the antennas would be a permitted use on the KISS Tower.

*7 The Board stipulated that the antennas would be permitted in the Light Industrial District. The record also supports that the sight known as SAP America might be a suitable location for plaintiff's antennas (Tr. at 243). However, due to the fact that the single owner of this district is unwilling to negotiate, the site was not investigated further. In its findings, the Board stated that there is no requirement that forces one landowner to contract with a prospective user of land for the purposes for which the prospective user wishes to make of the land. The Board also states that "neither the Township nor the State has the authority to force a private owner of land to make their land available for anyone's use not to do so except through the doctrine of eminent domain" (Ex. Mfindings at 14-15). While this may be true, the fact that the Township has only one available district where the antennas would be permitted, that would actually fill plaintiff's gap in coverage and that the entire district is owned by a single owner, does not seem to be sufficient to satisfy the Act. While the Township cannot be held responsible if all parties are unwilling to negotiate with parties in plaintiff's situation, it must at least provide a reasonable opportunity for negotiations. The Board's findings in this case result in a ban of plaintiff's coverage, in violation of the TCA. The Board's findings and

---

[19] The Chairman stated on the record at the time of Parsia's cross-examination that it had not been established whether repeaters would be a permitted use or not (Tr. at 101).

conclusions relating to whether there was a violation of the TCA are not supported by substantial evidence.

CIVIL RIGHTS ACT

Plaintiff claims the Township and the Zoning Board acted under the color of state law when they violated the Telecommunications Act and request attorney's fees under the Civil Rights Act, 42 U.S.C. § 1983. The Civil Rights Act states:

> "Every person, who under color of any statute, ordinance, regulation, custom, usage of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 U.S.C. § 1983.

In order to demonstrate a violation of § 1983, the plaintiff must demonstrate not only the violation of the TCA, but also that such a violation can be redressed through the Civil Rights Act. Two requirements must be met in order for a cause of action under § 1983 to exist from a violation of a federal statute. West Virginia University Hospital, Inc. v. Casey, 885 F.2d 11 (3d Cir. 1989) (citing, Penhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981)). First, the plaintiff must allege a violation of a federal right, not merely a federal law. Blessing v. Freestone, 520 U.S. 329 (1997). Second, the federal law must not reflect congressional intent to foreclose private enforcement. Id.

*8 The Court in Blessing listed three factors to determine whether a statutory provision creates a privately enforceable right: (1) whether the plaintiff is the intended beneficiary of the statute; (2) whether the plaintiff's asserted interests are not so vague and amorphous as to be beyond the competence of the judiciary to enforce; and (3) whether the statute imposes a binding obligation on the State. Id. (citing Wilder v. Virginia Hospital Ass'n, 496 U.S. 498, 509 (1990)). If plaintiff demonstrates such a right, there is a rebuttable presumption that it is enforceable under § 1983. Id. However, the right is not enforceable under § 1983 if Congress has either specifically foreclosed a § 1983 remedy or impliedly foreclosed such a remedy by creating a comprehensive enforcement scheme that is incompatible with individual § 1983 enforcement. Id. (citing Smith v. Robinson, 468 U.S. 992 (1984), Livadas v. Bradshaw, 512 U.S. 107, 133 (1994)).

The TCA imposes requirements on state and local authorities in order to facilitate the construction of personal wireless communication facilities. The Act was clearly intended to benefit entities such as the plaintiff, Omnipoint, thus satisfying the first requirement. See Omnipoint Communications v. Zoning Hearing Board of Chadds Ford, 1998 WL 764762, *5 (E.D.Pa.). The Act also gives the courts the power of judicial review of the decisions made by local zoning authorities. It specifically provides that the court should hear and decide such an action on an expedited basis. 47 U.S.C. § 332(c)(7)(B)(v). The fact that the Act specifically allows for such judicial review demonstrates that the Act is not so vague that it can not be judicially enforced. See Chadds Ford, supra. Therefore, the second requirement is also satisfied. Id. In order to satisfy the third requirement, the provision of the statute giving rise to the alleged right must be phrased in mandatory rather than precatory terms.

Blessing, supra. The TCA imposes a binding obligation upon the States, which can be redressed in federal court. The Act places clear mandatory limitations upon the State and local authorities, thus also satisfying this third requirement. See 47 U.S.C. (c)(7)(B). Therefore, under this test, the TCA provides a privately enforceable right.

The next question is whether Congress has either specifically or impliedly foreclosed a § 1983 remedy. The TCA clearly does not contain language which specifically forecloses a remedy under the Civil Rights Act. The only remaining issue is whether the TCA contains a remedial scheme, which is sufficiently comprehensive to infer Congressional intent to foreclose a § 1983 remedy. The Supreme Court has inferred such intent only twice, in Middlesex County Sewage Authority v. Sea Clammers, 453 U.S. 1 (1981) and in Smith v. Robinson, 468 U.S. 992 (1984). Blessing, supra.

In Sea Clammers, 453 U.S. 1 (1981), the plaintiff attempted to maintain a § 1983 claim for violations of the Federal Water Pollution Control Act ("FWPCA") and the Marine Protection, Research, and Sanctuaries Act of 1972 ("MPRSA"). The Court held that when enacting the FWPCA and MPRSA, Congress intended to supplant any remedies that would otherwise be available under § 1983. Id. at 20. The FWPCA prohibits the discharge of certain levels of waste without a valid permit and the MPRSA requires permits before dumping waste into coastal waters. Id. at 11-12. The Court found the enforcement mechanism of both statutes to be comprehensive because of their specific statutory remedies, including citizen suit provisions. Id. at 20.

*9 In Smith v. Robinson, 468 U.S. 992 (1984), the

Court considered whether Congress intended to foreclose a § 1983 remedy when enacting the Education for All Handicapped Children Act ("EHA"). The Court held that the EHA is a comprehensive scheme. Id. at 1009. The Court determined that Congress intended that the EHA be available for handicapped children to pursue their claims to a publicly financed special education through the "carefully tailored administrative and judicial mechanism set out in the statute." Id. Given the procedures set forth in the statute, including a process beginning on a local level, parental safeguards, and a right to judicial review, the Court concluded that Congress did not intend for a § 1983 remedy to be available to enforce the Act.[20] Id. at 1010-11.

In cases where the Court has not found statutes to be so comprehensive as to foreclose a remedy under § 1983, it has been because the enforcement scheme included within the statutes was more limited. In Blessing, the Court noted that in contrast to the statutes in Sea Clammers and Smith, the statute in question did not contain a "private remedy--either judicial or administrative--through which aggrieved persons can seek redress." Blessing, supra. In Wright v. City of Roanoke Redevelopment & Housing Authority, 479 U.S. 418 (1987), the Court also noted that the statute in question did not provide for a judicial remedy, evidencing Congressional intent to foreclose a § 1983 remedy. Id. at 427.

The Third Circuit has not ruled on whether the TCA provides a comprehensive enforcement mechanism, which

---

[20] After the Court's ruling that a § 1983 remedy was not intended to be available to enforce the Act, Congress amended the EHA to allow for attorney's fees. See Fontenot v. Louisiana Bd. of Elementary and Secondary Education, 805 F.2d 1222 (5th Cir. 1986).

forecloses a § 1983 remedy. However, there are two district court cases dealing with this precise issue. See Omnipoint v. Penn Forest Township, 1999 WL 181954 (M.D. Pa); Omnipoint v. Zoning Bd. of Chadds Ford Township, 1998 WL 764762 (E.D. Pa.). In both cases, the courts examined the opinion of the Massachusetts district court in National Telecommunication Advisors v. City of Chicopee, 16 F. Supp 2d 117 (D. Mass. 1998), in which the district court found the TCA foreclosed a § 1983 remedy.

The Court in Chadds Ford, concluded that the TCA does not provide a remedial scheme sufficient to preclude a § 1983 remedy. The court disagreed with National Telecommunication Advisors, stating that taken to its limit, the court's reading of the cases "suggests that any remedial scheme that provides a mechanism for judicial relief would render the scheme sufficiently comprehensive to infer Congressional intent to foreclose reliance on § 1983." Chadds Ford, supra at *9. The court in Chadds Ford, determined that the enforcement mechanism of the TCA is not as elaborate as those in Sea Clammers and Robbins and concluded that judicial deference is in conformity with the Third Circuit's interpretation of the Sea Clammers' doctrine in Johnson v. Orr, 780 F.2d 386 (3d Cir. 1986). Chadds Ford, supra at *9-10.

***10** In contrast, the court in Penn Forest found that "[j]udicial review was precisely the remedial factor emphasized in Smith, Sea Clammers, Wright and Blessing " and concluded that the TCA, which provides for expedited federal judicial review, is comprehensive. Penn Forest, supra at *9. The court stated that although the enforcement mechanism is not elaborate, "the simplicity of its remedial scheme does not preclude a determination that it is comprehensive." Id. at *11.

After careful consideration, this Court is of the opinion that the TCA contains a remedial scheme which is sufficiently comprehensive to infer Congressional intent to foreclose a § 1983 remedy. The Telecommunications Act clearly directs a remedy for private parties. Litigants may seek direct relief in district court, without any exhaustion requirement and their hearing must be expedited. 47 U.S.C. § 332(C)(7)(B)(v).

The only purpose that a suit under § 1983 serves in a case such as this is that it enables recovery of attorney's fees. I agree with the courts in National Telecommunications Advisors and Penn Forest that the addition of a Civil Rights Count merely for the recovery of attorneys fees seems to undermine the importance of § 1983 and its intended purpose.

> "The comprehensiveness of the TCA's remedial scheme is perhaps best evidenced by the fact that the § 1983 statutory apparatus adds nothing to plaintiff's remedial armament under the TCA--except the opportunity to seek attorney's fees under § 1988. In other words, plaintiff has tacked Count III onto its complaint merely for fees. While the desire to recoup fees is understandable, the use of § 1983 in such a way trivializes this important statute and is inconsistent with its intent."

Omnipoint Communications, Inc. v. Penn Forest Township, 1999 WL 181954 (M.D.Pa.) (quoting National Telecommunication Advisors, Inc. v. City of Chicopee, 16 F. Supp.2d 117, 122 (D. Mass. 1998)).

The TCA mandates a private cause of action and expedited review. The addition of a Civil Rights Claim does

not provide an additional enforcement mechanism for a violation of the Act. The Act provides a comprehensive mechanism for enforcement, but notably does not contain a provision allowing for attorney's fees. The allowance of fees in cases dealing with violations of the TCA would result in fees being ultimately borne by the taxpayers of the respective townships. To allow the addition of a § 1983 claim merely for the allowance of fees, not only violates the intent of the Civil Rights Act, but also unfairly places a burden on the taxpayers of localities that in good faith defend claims under the TCA. For these reasons, this Court concludes that by specifically setting forth the available remedies for enforcement Congress intended to foreclose the availability of a § 1983 claim to enforce violations of the TCA. Accordingly, defendant's motion for summary judgment as to this claim is granted and plaintiff's claim for fees is denied.

STATE LAW CLAIM

*11 Finally, plaintiff alleges that defendant has violated Pennsylvania zoning law. Under State law a court will reverse the decision of a zoning board when the board has committed an abuse of discretion or an error of law. Hertzberg v. Zoning Bd. of Adjustment, 721 A.2d 43, 46 (Pa. 1998) (citing Larsen v. Zoning Bd. of Adjustment, 543 Pa. 415, 419 (1996). In order to determine whether the board has abused its discretion, the court must determine whether the decision is supported by substantial evidence. Id. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion". Id. (citing Valley View Civic Ass'n v. Zoning Bd. of Adjustment, 501 Pa. 550, 555 (1983)).

As discussed above, the defendant's findings

regarding the Telecommunications Act are not supported by substantial evidence. The Board's findings must therefore be reversed.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OMNIPOINT COMMUNICATIONS ENTERPRISES, L.P., Plaintiff	:	CIVIL ACTION
vs.	:	
NEWTOWN TOWNSHIP, and ZONING HEARING BOARD OF NEWTOWN TOWNSHIP	:	
Defendants	:	NO. 98-5171

ORDER

AND NOW, to wit, this 29th day of April, 1999, after this Court's findings of April 21st, 1999, that:

1. Plaintiff's Motion for Summary Judgment is GRANTED; and

2. Defendants' Motion for Summary Judgment is DENIED, It is further ORDERED that:

3. Pursuant to this Court's authority under 47 U.S.C. § 332(c)(7)(B)(v):

(a) The application submitted by Omnipoint to the Zoning Board is hereby GRANTED;

(b) Newtown Township shall take all steps necessary to allow for the proposed installation within 10 days from the

date of this Order; and

4. Plaintiff's claim for attorney's fees under The Civil Rights Act is DENIED.

It is so ORDERED.

BY THE COURT:

s/_____

CHARLES B. SMITH
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OMNIPOINT COMMUNICATIONS ENTERPRISES, L.P., Plaintiff	:	CIVIL ACTION
vs.	:	FILED: June 2, 1999
NEWTOWN TOWNSHIP, and ZONING HEARING BOARD OF NEWTOWN TOWNSHIP Defendants	:	NO. 98-5171

MEMORANDUM AND ORDER

CHARLES B. SMITH
UNITED STATES MAGISTRATE JUDGE

BACKGROUND

*1 Presently before the Court is plaintiff's Motion for Relief Under Rule 60(b)(6). This Court issued a Memorandum and Order on April 29, 1999, granting Plaintiff Omnipoint's Motion For Summary Judgment against Newtown Township for claims dealing with the Telecommunications Act (TCA), but denying plaintiff's claim for attorney's fees filed under the Civil Rights Act. On May 18, 1999, plaintiff filed the instant motion seeking to have that portion of the order dealing with the Civil Rights Act amended. For the reasons that follow, the motion is denied.

DISCUSSION

Rule 60(b) states that "on motion and upon terms that are just, the court may relieve a party or a party's legal representative from a final judgment, order or proceeding" for one of the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence; (3) fraud, misrepresentation or misconduct; (4) the judgment is void; (5) the judgment has been satisfied or released; or (6) "any other reason justifying relief from the operation of the judgment". Fed.R.Civ.P. 60(b). Plaintiff in this case has filed the current motion under Rule 60(b)(6). Plaintiff argues that this court's ruling that the Telecommunications Act precludes a claim for attorney fees under the Civil Rights Act is "inconsistent with controlling precedent of the United States Court of Appeals for the Third Circuit which was not previously considered" and asks that the Court "correct a plain error of law" (motion at 1-2).

Plaintiff cites a third circuit case, W.B. v. Matula, 67 F.3d 484 (3d Cir. 1995), in which the court considered whether the Individuals with Disabilities Education Act ("IDEA"), formerly known as the Education of the Handicapped Act ("EHA"), precluded a § 1983 action for a violation of the Act. The court held that although the statute contained an elaborate scheme and allowed for access to federal court, a § 1983 action was not precluded, but was preserved by the savings clause contained in the statute. The statute states "nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973, or other Federal statutes ..." 20 U.S.C. 1415(f). This provision was added by Congress after the Supreme Court in Smith v. Robbinson, held in 1984 that the EHA precluded

additional remedies. The savings clause was added by Congress for the express purpose of overruling Smith and to allow for additional remedies under § 1983 and § 504.

This is entirely different than the present case. In Matula, there was little question of Congress' intent. The Supreme Court had already dealt with the statute in question and Congress had responded by adding the savings clause. In contrast, the present case deals with the Telecommunications Act, which the Supreme Court has not yet addressed and to which Congress has not so clearly spoken.[21] Therefore, this case is of little help in our analysis.

*2 Plaintiff has brought to the court's attention, a case decided by Judge Bechtle just prior to the decision issued in this case, of which this court was previously unaware. In Cellco Partnership v. Hess, 1999 WL 178364 (E.D. March 30, 1999), Judge Bechtle found that the Telecommunications Act's remedial scheme is not so comprehensive as to imply that Congress intended to foreclose section 1983 remedies. Judge Bechtle agreed with Judge Padova's opinion in Omnipoint v. Zoning Hearing Board of Chadds Ford Township, 1998 WL 764762 (E.D. Pa.), in which Judge Padova disagreed with the court in National Telecommunication Advisors v. City of Chicopee, 16 F. Supp.2d. 117 (D. Mass. 1998). However, since I

---

[21] The savings clause in the TCA states "[n]othing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 47 U.S.C. § 414. It is worth noting that this clause has not been cited by the courts addressing this issue. The clause cannot be said to as clearly express Congress' intent on this issue as the clause in Matula, which mentions specific statutes and was added in response to the Supreme Court's ruling.

considered Judge Padova's reasoning in my previous memorandum and Judge Bechtle simply followed that reasoning, the opinion does not alter my decision.

Notwithstanding that now two of my district court colleagues have chosen a different view, my opinion remains that the Telecommunications Act contains a remedial scheme that while not elaborate, is sufficiently comprehensive to infer Congressional intent to foreclose a section 1983 remedy. As stated by the court in Omnipoint v. Penn Forest Township, 1999 WL 181954 (M.D. Pa.), "judicial review was precisely the remedial factor emphasized in Smith, Sea Clammers, Wright, and Blessing." Penn Forest at *9. The Telecommunications Act, does not only allow for federal judicial review, but it specifically states that private parties may seek direct relief in district court, without prior exhaustion, and that such a case must be heard on an expedited basis. 47 U.S.C. § 332(c)(7)(B)(v).

As I previously stated, the only purpose a claim under § 1983 would serve in an action based upon a violation of the Telecommunication Act is to allow for the award of attorney's fees under § 1988. The fact that no additional remedy other than the recovery of fees is added by a claim under the Civil Rights Act is further evidence of the Act's comprehensiveness. As the courts in National Telecommunication Advisors v. City of Chicopee and Omnipoint v. Penn Forest reasoned, the use of the Civil Rights Act for the sole purpose of obtaining attorney's fees appears to trivialize and undermine the importance of the Civil Rights Act. See National Telecommunication Advisors, supra. at 122-123; Penn Forest, supra. at *13. It seems clear that Congress' intent when enacting the Civil Rights Act was not for it to be tacked onto other causes of action for the sole purpose of recovering fees. The intent of the fee provision in

the Civil Rights Act was to award fees to individual victims who have been wronged by Constitutional violations, not to force taxpayers to pay fees to large corporations in cases brought for violations under the TCA. The addition of this claim also does not serve any purpose intended by the enactment of the TCA.

In addition, my perspective coming out of the Pennsylvania system is different than that of my district court colleagues. The Supreme Court of Pennsylvania has always held and most recently unanimously reaffirmed in Merlino v. Delaware County, 1999 WL 262290 (Pa. May 3, 1999), that attorneys fees are typically not awarded unless the allowance of fees is specifically permitted by the statute violated. Merlino at *2. The use of the Civil Rights Act for the sole purpose of granting attorney's fees undermines the intent of the Civil Rights Act as well as the general principle regarding fee shifting. The allowance of fees in cases brought under the Telecommunications Act also unfairly places an additional burden on the local entities litigating under the Act, which will ultimately be borne by the taxpayers. "Given that litigation under the TCA will inevitably be directed, from time to time, at relatively unsophisticated, small or remote townships, the absence of any provision for fees in the TCA is telling." National Telecommunication Advisors Inc., supra. at 121.

*3 In conclusion, mindful of my colleagues' opinions, I respectfully disagree and maintain agreement with at least one other district court in the circuit and with the district court of Massachusetts, that a § 1983 remedy for a violation of the Telecommunications Act has been impliedly foreclosed. See Omnipoint v. Penn Forest Township, 1999 WL 181954 (M.D. Pa.); National Telecommunication Advisors, Inc. v. City of Chicopee, 16 F.

Supp.2d 117 (D. Mass. 1998). My reasoning for denying the claim under the Civil Right Act remains. The Telecommunications Act allows for a private cause of action, allowing citizens to take direct action in district court and to do so on an expedited basis. The Act's enforcement scheme is not elaborate, but is comprehensive enough to imply that Congress intended to foreclose action under § 1983. As stated by defendant in its response to this motion, there is currently a split in this circuit which should properly be addressed by filing an appeal rather than a motion under Rule 60(b)(6). Therefore the motion is denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OMNIPOINT COMMUNICATIONS ENTERPRISES, L.P., Plaintiff	:	CIVIL ACTION
vs.	:	
NEWTOWN TOWNSHIP, and ZONING HEARING BOARD OF NEWTOWN TOWNSHIP Defendants	:	NO. 98-5171

ORDER

AND NOW, to wit, this 1st day of JUNE, 1999, upon consideration of plaintiff's Motion for Relief Under Rule 60(b) and defendant's response thereto, it is hereby ORDERED that plaintiff's Motion is DENIED.

BY THE COURT:

s/_____

CHARLES B. SMITH
UNITED STATES MAGISTRATE JUDGE

TELECOMMUNICATIONS ACT

§ 332. Mobile services

(a) Factors which Commission must consider

In taking actions to manage the spectrum to be made available for use by the private mobile services, the Commission shall consider, consistent with section 151 of this title, whether such actions will--

(1) promote the safety of life and property;

(2) improve the efficiency of spectrum use and reduce the regulatory burden upon spectrum users, based upon sound engineering principles, user operational requirements, and market-place demands;

(3) encourage competition and provide services to the largest feasible number of users; or

(4) increase interservice sharing opportunities between private mobile services and other services.

(b) Advisory coordinating committees

(1) The Commission, in coordinating the assignment of frequencies to stations in the private mobile services and in the fixed services (as defined by the Commission by rule), shall have authority to utilize assistance furnished by advisory coordinating committees consisting of individuals who are not officers or employees of the Federal Government.

(2) The authority of the Commission established

in this subsection shall not be subject to or affected by the provisions of part III of Title 5 or section 1342 of Title 31.

(3) Any person who provides assistance to the Commission under this subsection shall not be considered, by reason of having provided such assistance, a Federal employee.

(4) Any advisory coordinating committee which furnishes assistance to the Commission under this subsection shall not be subject to the provisions of the Federal Advisory Committee Act.

(c) Regulatory treatment of mobile services

(1) Common carrier treatment of commercial mobile services

(A) A person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this chapter, except for such provisions of subchapter II of this chapter as the Commission may specify by regulation as inapplicable to that service or person. In prescribing or amending any such regulation, the Commission may not specify any provision of section 201, 202, or 208 of this title, and may specify any other provision only if the Commission determines that--

(i) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory;

(ii) enforcement of such provision is not necessary for the protection of consumers; and

(iii) specifying such provision is consistent with the public interest.

(B) Upon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of section 201 of this title. Except to the extent that the Commission is required to respond to such a request, this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this chapter.

(C) The Commission shall review competitive market conditions with respect to commercial mobile services and shall include in its annual report an analysis of those conditions. Such analysis shall include an identification of the number of competitors in various commercial mobile services, an analysis of whether or not there is effective competition, an analysis of whether any of such competitors have a dominant share of the market for such services, and a statement of whether additional providers or classes of providers in those services would be likely to enhance competition. As a part of making a determination with respect to the public interest under subparagraph (A)(iii), the Commission shall consider whether the proposed regulation (or amendment thereof) will promote competitive market conditions, including the extent to which such regulation (or amendment) will enhance competition among providers of commercial mobile services. If the Commission determines that such regulation (or amendment) will promote competition among providers of

commercial mobile services, such determination may be the basis for a Commission finding that such regulation (or amendment) is in the public interest.

(D) The Commission shall, not later than 180 days after August 10, 1993, complete a rulemaking required to implement this paragraph with respect to the licensing of personal communications services, including making any determinations required by subparagraph (C).

(2) Non-common carrier treatment of private mobile services

A person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this chapter. A common carrier (other than a person that was treated as a provider of a private land mobile service prior to the enactment of the Omnibus Budget Reconciliation Act of 1993) shall not provide any dispatch service on any frequency allocated for common carrier service, except to the extent such dispatch service is provided on stations licensed in the domestic public land mobile radio service before January 1, 1982. The Commission may by regulation terminate, in whole or in part, the prohibition contained in the preceding sentence if the Commission determines that such termination will serve the public interest.

(3) State preemption

(A) Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile

service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates. Notwithstanding the first sentence of this subparagraph, a State may petition the Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such petition if such State demonstrates that--

(i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or

(ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.

The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition. If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such periods of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory.

(B) If a State has in effect on June 1, 1993, any regulation concerning the rates for any commercial mobile service offered in such State on such date, such State may, no later than 1 year after August 10, 1993, petition the Commission requesting that the State be authorized to continue exercising authority over such rates. If a State files such a petition, the State's existing regulation shall, notwithstanding subparagraph (A), remain in effect until the Commission completes all action (including any reconsideration) on such petition. The Commission shall review such petition in accordance with the procedures established in such subparagraph, shall complete all action (including any reconsideration) within 12 months after such petition is filed, and shall grant such petition if the State satisfies the showing required under subparagraph (A)(i) or (A)(ii). If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such period of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory. After a reasonable period of time, as determined by the Commission, has elapsed from the issuance of an order under subparagraph (A) or this subparagraph, any interested party may petition the Commission for an order that the exercise of authority by a State pursuant to such subparagraph is no longer necessary to ensure that the rates for commercial mobile services are just and reasonable and not unjustly or unreasonably discriminatory. The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition in whole or in part.

(4) Regulatory treatment of communications

satellite corporation

Nothing in this subsection shall be construed to alter or affect the regulatory treatment required by title IV of the Communications Satellite Act of 1962 [47 U.S.C.A. § 741 et seq.] of the corporation authorized by title III of such Act [47 U.S.C.A. § 731 et seq.].

(5) Space segment capacity

Nothing in this section shall prohibit the Commission from continuing to determine whether the provision of space segment capacity by satellite systems to providers of commercial mobile services shall be treated as common carriage.

(6) Foreign ownership

The Commission, upon a petition for waiver filed within 6 months after August 10, 1993, may waive the application of section 310(b) of this title to any foreign ownership that lawfully existed before May 24, 1993, of any provider of a private land mobile service that will be treated as a common carrier as a result of the enactment of the Omnibus Budget Reconciliation Act of 1993, but only upon the following conditions:

(A) The extent of foreign ownership interest shall not be increased above the extent which existed on May 24, 1993.

(B) Such waiver shall not permit the subsequent transfer of ownership to any other person in violation of section 310(b) of this title.

(7) Preservation of local zoning authority

(A) General authority

Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) Limitations

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof--

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request

to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

(C) Definitions

For purposes of this paragraph--

(i) the term "personal wireless services" means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

(ii) the term "personal wireless service facilities" means facilities for the provision of

personal wireless services; and

(iii) the term "unlicensed wireless service" means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to- home satellite services (as defined in section 303(v) of this title).

(8) Mobile services access

A person engaged in the provision of commercial mobile services, insofar as such person is so engaged, shall not be required to provide equal access to common carriers for the provision of telephone toll services. If the Commission determines that subscribers to such services are denied access to the provider of telephone toll services of the subscribers' choice, and that such denial is contrary to the public interest, convenience, and necessity, then the Commission shall prescribe regulations to afford subscribers unblocked access to the provider of telephone toll services of the subscribers' choice through the use of a carrier identification code assigned to such provider or other mechanism. The requirements for unblocking shall not apply to mobile satellite services unless the Commission finds it to be in the public interest to apply such requirements to such services.

(d) Definitions

For purposes of this section--

(1) the term "commercial mobile service" means any mobile service (as defined in section 153 of this title) that is provided for profit and makes interconnected service

available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission;

(2) the term "interconnected service" means service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission) or service for which a request for interconnection is pending pursuant to subsection (c)(1)(B) of this section; and

(3) the term "private mobile service" means any mobile service (as defined in section 153 of this title) that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission.

CIVIL RIGHTS ACT

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C.A. § 1983

ZONING ORDINANCE

§ 172-1. Word usage.

The present tense includes the future; the singular number includes the plural and the plural the singular. The word "building" includes the word "structure" and shall be construed as if followed by the words "or part thereof." The word "occupy" includes the words "designed or intended to be occupied." The word "use" includes the words "arranged, designed or intended to be used." The word "shall" is always mandatory.

§ 172-2. Definitions.

A. Unless otherwise expressly stated, the following words and phrases shall be construed throughout this chapter to have the meanings indicated in this Article:

ACCESSORY BUILDING —— A structure subordinate to the main building on a lot and used for purposes customarily incidental to those of the main building.

ACCESSORY USE —— A use subordinate to the main use of the land or of a building on a lot and customarily incidental thereto.

APARTMENT —— A room or group of rooms in an apartment house designated for and occupied exclusively as a residence for only one (1) family.

APARTMENT HOUSE BUILDING —— A building designated for and occupied exclusively as a residence for three (3) or more families living independently of one another and which building is a single building unit

for purpose of operation, management and maintenance, and/or a group of one (1) or more townhouses or row houses. **[Amended 10-11-1976 by Ord. No. 1976-4]**

BASEMENT — A space of full story height, wholly or partly below exterior grade, which is not used for living accommodations other than for janitor's quarters.

BOARDINGHOUSE or ROOMING HOUSE — A house in which more than three (3) people are sheltered or fed for profit.

BUILDING — Any structure, including main or accessory building.

(1)DETACHED BUILDING — A building which has no party wall.

(2)SEMIDETACHED BUILDING — A building which has only one (1) party wall.

BUILDING AREA — The aggregate of the maximum horizontal cross-section area of all buildings on a lot, excluding cornices, eaves, gutters, steps, chimneys, balconies, unroofed terraces and unroofed porches.

BUILDING HEIGHT — The vertical measurement of a building from the mean or average level of the ground abutting the building to the highest point of the main roof, provided that chimneys, spires, towers, elevator penthouses, tanks and similar projections of the building shall not be included in calculating the height.

§ 172-81. Applicability.

In I Light Industrial Districts, the regulations contained in this Article shall apply.

§ 172-82. Permitted uses.

A building may be erected or used and a lot may be used or occupied for any of the following purposes and no others:

A. Offices for administrative, executive, professional sales and other similar uses.

B. Manufacturing, fabricating, assembling, packaging, and/or processing of the following: scientific and precision instruments and controls, electronic components, computers, pharmaceutical and optical goods, metalized and coated plastic film, photographic reproduction, film and equipment, jewelry and timepieces, candy, cosmetics, dairy products, drugs and perfume.

C. Cinema, radio and television productions.

D. newspaper, job printing or bookbinding establishment.

E. Distribution plants, parcel delivery, cold storage plants and bottling plants.

F. Electric transforming substations, microwave towers or other similar service uses. **[Amended 11-25-1996 by Ord. NO. 1996-4]**

G. Laboratories, experimental manufacturing and research.

H. Accessory uses incidental to any of the above-permitted uses, not detrimental to the neighborhood, including a cafeteria and other similar services operated by or for the employer for the exclusive use of its employees and business visitors.

I. Public or commercial parking.

J. Uses approved by the Board of Supervisors of the same general character as any of the above.

K. **[Added 1-6-1997 by Ord. No. 1997-1]** Conditional uses, subject to the provisions of §§ 172-88, 172-89 and 172-90.

§ 172-83. Area regulations.

A. Front yard, rear yard and side yards. Front, side and rear yards shall be a minimum of one hundred fifty (150) feet from any residential zoning district and fifty (50) feet from any property line or street right-of-way.

B. Lot coverage. The building area shall not exceed forty percent (40%) of the lot area, and the total of building area plus paved area shall not exceed sixty-five percent (65%) of the lot area.

C. Height regulations. No building shall exceed forty-five (45) feet in height.

D. Loading and unloading space. All buildings shall be provided with adequate off-street loading and unloading spaces located on other than the streets on which the lot abuts.

E. Parking spaces. Parking spaces shall comply with the requirements established in this Article and shall be sufficient to ensure that all parking related to the activities of the business shall be contained upon the lot.

F. Minimum lot area. The minimum lot area for any use shall be two (2) acres.

G. Buffer area. Along any part of the property line that is common with a lot in a residence district, there shall be a buffer area a minimum of fifty (50) feet side parallel with the property line; this buffer area shall be fenced from the adjoining property.